IN THE

Supreme Court of the United States

No. 638

OCTOBER TERM, 1939

APEX HOSIERY COMPANY, a Pennsylvania Corporation,
Petitioner

vs.

WILLIAM LEADER AND AMERICAN FEDERATION OF FULL-FASHIONED HOSIERY WORKERS, Philadelphia Branch No. 1, Local No. 706, *Respondents*

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit

BRIEF ON BEHALF OF CONGRESS OF INDUSTRIAL ORGANIZATIONS AMICUS CURIAE

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THE CORNELIUS PRINTING COMPANY

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STATEMENT

This brief, submitted on behalf of the Congress of Industrial Organizations, rests upon two fundamental propositions. The first is:

> "The assumption that the meaning of a representative assembly attached to the words used in a particular statute is rarely discoverable, has little foundation in fact. The records of legislative assemblies once opened and read with a knowledge of legislative procedure often reveal the rarest kind of evidence."[1]

[1] Landis, *Note on Statutory Interpretation* (1930) 43 Har. L. Rev. 886, 888.

The second is:

> "In this Court *stare decisis* in statutory construction is a useful rule, not an inexorable command."[2]
>
> "Surely we are not bound by reason or by the considerations that underlie *stare decisis* to persevere in distinctions taken in the application of a statute which, on further examination, appear consonant neither with the purpose of the statute nor with this Court's own conception of it."[3]

Upon these two basic premises we submit that the legislative history of Section 6 of the Clayton Act, not hitherto presented to this Court, conclusively demonstrates that Congress intended to give labor unions an exemption or immunity from being held or considered to be combinations in restraint of trade under the anti-trust laws.

We further submit that the legislative history warrants a reconsideration by this Court of its prior decisions and justifies the exercise by this Court of its power to correct past error in the construction of statutes. This reconsideration is essential to correct abuses in the distribution of powers in our representative form of government.

The issue which we raise was presented to the Court below and was squarely passed on by it, the Court in effect declaring that it was bound by the previous decisions of this Court. (*Leader v. Apex Hosiery Co.* 108 F (2d) 71, 75. The interest of the CIO in this case is evident. The respondent union is a local of one of its affiliates, and the CIO is itself facing a suit under the anti-trust laws for treble damages amounting

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[2] Mr. Justice Reed in *Erie Railroad v. Tompkins*, 304 U. S. 64, 91.
[3] *Helvering v. Hallock*, 60 Sup. Ct. 444, 453.

to $7,500,000. (*Republic Steel Corporation v. Congress of Industrial Organizations, et al.* D.C.N.D. E.D. Ohio, No. 19864.)

LIMITS OF IMMUNITY

At the outset, we wish to clarify what we consider to be the extent of the immunity for which we contend. This immunity goes beyond the protection of the mere existence of labor unions. It extends to any act which may be done by a combination of labor alone. It therefore extends to all of the activities undertaken by labor unions when acting by themselves, whether it be entering into a collective bargaining agreement or a strike, boycott or picketing. The coercive or violent nature of the action is immaterial. Other laws are available to punish criminal acts.

On the other hand, the immunity does not extend to any combination of labor and other persons engaged in a particular business or industry, which combination may be a restraint of trade as that term has been defined under the law. Thus, if a labor union joins with manufacturers and dealers in a combination, which without the presence of the union, would be unlawful under the anti-trust laws, that combination cannot have the benefit of an immunity given to a combination of labor alone and the union entering into that combination loses its immunity. This limited immunity is what we refer to in the argument set forth in this brief.

SUMMARY OF ARGUMENT

Since it has been considered settled that Section 6 does not confer even this limited immunity from the anti-trust laws upon labor unions, and since the full history of Section 6 has not been hitherto presented to this Court, we think it necessary at the outset to summarize the history upon which we rely, and which is

fully set forth and annotated in the following pages of this brief.

First: The text of Section 6 of the Clayton Act.

> "Sec. 6. That the labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural or horticultural organizations, instituted for the purpose of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws." (Act of Oct. 15, 1914, c. 323, Sec. 6; 38 Stat. 731; 15 U. S. C. Sec. 17.)

Second: The Sherman Act and its enforcement prior to the adoption of Section 6.

The record will amply demonstrate that Section 6 was enacted in order to remedy the fact that the Supreme Court had construed the Sherman Act to hold that the activities of labor unions were subject to its prohibition.

Third: Section 6 of the Clayton Act in its original form as reported to Congress. Originally Section 6 contained what is now the first clause of the second sentence:

> "Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural, horticultural organizations, instituted for the purpose of mutual help, and not having capital stock or conducted for profit or to forbid or restrain individual members of such organizations from carrying out the legitimate objects thereof."

The Committee report on the bill made it clear that the provision was only intended to protect the mere formation and existence of labor organizations.

Fourth: The Henry Amendment. This amendment in the House added the last clause of the present section, namely,

> "Nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade under the anti-trust laws."

This amendment was expressly offered and adopted because the bill as introduced did not go far enough in exempting labor unions from the law.

Fifth: The Thomas and McDonald Amendments. These proposed amendments in the House read as follows:

> "The provisions of the anti-trust laws shall not apply to agricultural, labor or consumers, fraternal, horticultural orders and associations."

They were advocated on the ground that the Henry Amendment did not accomplish the purpose of exempting labor unions, but both were rejected, after a statement by one of the sponsors of the Henry Amendment that the Henry Amendment in fact was stronger and better.

Sixth: The Culberson Amendment: This amendment in the Senate added the first sentence of Section 6:

> "That the labor of a human being is not a commodity or article of commerce."

It was proposed and adopted in the course of the Senate debate in order to overcome the doubts expressed by

certain Senators that the bill as passed by the House, with the Henry amendment, did not accomplish its purpose of giving labor unions a limited immunity.

Seventh: The Gallinger Amendment: This amendment in the Senate was a proposed substitute for the last sentence of Section 6 and read as follows:

> "Nor shall such organizations *when lawfully conducted* be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws." (Italics indicate proposed change.)

This amendment was offered expressly because the bill as passed by the House exempted even unlawful activities of labor unions. It was twice voted down and repudiated in principle a third time by the Senate.

Eighth: The judicial decisions construing Section 6. The full legislative history was not considered by the Court in the decision holding that Section 6 applied to the activities of labor unions.

Ninth: Subsequent legislation by Congress. The decisions of this Court are inconsistent with subsequent statutes dealing with the subject of labor unions.

The evidence of Congressional meaning attached to Section 6 is thus richly ample. Specifically, the exemption of labor unions was a change made in the light of the earlier statute and its enforcement; the exemption was lacking in the Clayton bill in its original form; it was supplied in the House by an amendment proposed and adopted for that purpose; a claim to the need for a broader amendment was rejected in the House as unnecessary; it was supplied again by amendment in the Senate proposed and adopted for that pur-

pose; and an amendment to restrict its scope was twice rejected in the Senate as undesirable.

The rule of stare decisis cannot stand in the way of the correction demanded by this history because, first, the previous decision was made in ignorance of this history, and second, in subsequent legislation Congress has set forth a national policy which demonstrates that the error of the decision constitutes a serious social evil.

There is one further fact which underlies with emphasis the particular parliamentary events in the course of the passage of Section 6 of the Clayton Act. This is the fact that the issue of the limited immunity to be given to labor unions under the anti-trust laws was a major political issue from 1908 to 1914. It formed an important item in the platform of one of the political parties, and became its first order of business when that party came into power. It was one of the burning issues of the day. In short, the history of this law is not simply a case where Congress, acting within its general authority as a delegated representative body, passed a law, but rather where the entire machinery of representative government was invoked to secure the passage of a specific measure. Although labor won in Congress, it was defeated in the courts.

These forces compel a re-examination of the legislative history and a correction if error be shown. So Mr. Justice Frankfurter wrote in 1930:

> "But in one field of its operations the Sherman law has had clear results. There can be no doubt of its potency as a restraint upon the activities of organized labor. Here again, one must avoid attributing to law the consequences of economic forces and charging to Court decrees the inadequacies of labor leadership. But when all discounts

are made, it is common ground among students of the Sherman Law, as well as among industrial and labor leaders, that it has been one of the strongest influences counteracting trade unionism in the United States. Yet labor consistently denies that its activities are even subject to the Sherman Law. Though it has been judicially settled since 1908 that labor is amenable to the Sherman Law, the question is not closed for historians and it is wide open in the minds of labor. If moral assent to the authority of a law is of vital importance to the reign of law in a democracy, it can never be too late or too academic to examine the grounds on which rest even so well settled a doctrine as that the Sherman Law governs the activities of labor organizations." (Berman, Labor and the Sherman Act, p. xiv.)

ARGUMENT

I. THE INTENT OF CONGRESS CAN BE FOUND IN THE LEGISLATIVE RECORDS AND DEBATES.

We have indicated the nature of the guides which we have taken to ascertain the meaning to be given to Section 6 of the Clayton Act. They are succinctly set forth by Dean Landis:

> "Legislative history similarly affords in many instances accurate and compelling guides to legislative meaning. Successive drafts of the same Act do not simply succeed each other as isolated phenomena, but the substitution of one for another necessarily involves an element of choice often leaving little doubt as to the reasons governing such a choice. The voting down of an amendment or its acceptance upon the statements of its proponents again may disclose real evidence of intent. Changes made in the light of earlier stat-

utes and their enforcement . . . give evidence of a real and not a fictitious intent." Landis, *A Note on Statutory Interpretation* (1930), 43 Harv. L. Rev. 886, 889.

These guides were employed in the decision of this court in the case of *Dickinson Industrial Site v. Cowan*, decided this term, 308 U. S. —.

In the case of *United States v. Phelps*, 107 U. S. 320, this Court overruled its previous decision in *Shelton v. Collector, 5 Wall*, 113, upon the illuminating examination of the history of the statute in question made by the court below. (20 Blatchf. 129.)

The notable discoveries concerning Section 34 of the Judiciary Act which led this Court to overrule the century old rule of *Swift v. Tyson* were based upon the same guides. Warren, *New Light on the History of the Judiciary Act of 1789* (1923), 37 Harv. L. Rev. 49.

See, as further instances,

Piedmont Coal Co. v. Seaboard Fisheries, 254 U. S. 1, 11.
Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282, 299.
Omaechavarria v. Idaho, 246 U. S. 343.

In the case of the anti-trust laws, we shall see that the legislative record is abundant and rich. Indeed, it presents an unusually complete disclosure of the draftsmen of Section 6, and the forces behind them.

II. THIS COURT HAS THE POWER TO CORRECT ERRONEOUS CONSTRUCTIONS OF CONGRESSIONAL INTENT.

It has been squarely held by this Court that the anti-trust laws do apply to the activities of labor unions.

Loewe v. Lawlor, 208 U. S. 274.
Duplex Printing Co. v. Deering, 254 U. S. 443.

The Court below relied expressly upon these decisions and the cases following them. *Leader v. Apex Hosiery*, 108 F. (2d) 71, 75.

We are therefore faced with the question of whether, assuming that a re-examination of the legislative history should disclose that Congress clearly intended to exempt labor unions and that the previous decisions of this Court were in error, this Court can overrule this settled construction of the law.

We believe it is by now well established that this Court has the power to correct previous decisions involving the construction of statutes where clear error is shown.

Helvering v. Hallock, 60 Sup. Ct. 444.
Neirbo Co. v. Bethlehem Shipbuilding Corp., 60 Sup. Ct. 153.
Burnet v. Coronado Oil & Gas Co., 285 U. S. 393, 406.

As the concurring opinion of Mr. Justice Reed states in the case of *Erie Railroad v. Tompkins*, 304 U. S. 64, 91, it is not necessary that the error must involve a question of the interpretation of the construction. Mr. Justice Reed stated:

> "In this Court, *stare decisis*, in statutory construction is a useful rule, not an inexorable command. (Citing cases.) It seems preferable to overturn an established construction of an act of Congress, rather than, in the circumstances of this case, to interpret the Constitution."

While Mr. Justice Brandeis in the *Erie Railroad* case rested his reversal of the long established doctrine

of *Swift v. Tyson* upon the fact that it was an unconstitutional construction, nevertheless he himself has recognized that the existence of a constitutional question is not necessary to the exercise of the power by this Court to correct itself. *Burnet v. Coronado Oil & Gas Co.*, supra.

In his dissenting opinion in the Burnet case, Mr. Justice Brandeis collected nine clear instances, dating from the history of this Court since 1830, in which previous constructions of statutes were expressly overruled. (283 U. S. at p. 406.)

Chicago and Eastern Railroad Co. v. Industrial Commissioner of Ill., 284 U. S. 296 (1932), overruling *Erie Railroad v. Collins*, 253 U. S. 77 (1920), and *Erie Railroad v. Szary*, 253 U. S. 86 (1920).

Gleason v. Seaboard Airline Railway Co., 278 U. S. 349 (1929), overruling *Freidlander v. Texas and Pacific Railway Co.*, 130 U. S. 416 (1889).

Lee v. Chesapeake & Ohio Railway Co., 260 U. S. 653 (1923), overruling *Ex Parte Wisner*, 203 U. S. 449 (1906).

Boston Store v. American Graphaphone, 246 U. S. 8 (1918), overruling *Henry v. Dick Co.*, 224 U. S. 1 (1912).

Rosen v. United States, 245 U. S. 467 (1918), overruling *U. S. v. Reid*, 12 How. 361 (1851).

Kountze v. Omaha Hotel Co., 107 U. S. 378 (1882), overruling *Stafford v. Union Bank of Louisiana*, 16 How. 135 (1854).

U. S. v. Phelps, 107 U. S. 320 (1883), overruling *Shelton v. Collector*, 5 Wall. 113 (1867).

Hornbuckle v. Toombs, 18 Wall. 648 (1873), overruling *Orchard v. Hughes*, 1 Wall. 73 (1863).

Gordon v. Ogden, 3 Pet. 33 (1830), overruling *Wilson v. Daniels*, 3 Dal. 401 (1798).

It is significant to note that one of these instances involves the statute in the case at bar, namely, the anti-trust laws. The decision in the *Boston Store v. American Graphaphone Company* case, supra, held that the monopoly granted by the patent laws did not protect restrictions upon the subsequent use and sale of the patented article against the ban of the anti-trust laws. It overruled the contrary decision in the *Henry v. Dick Company*, supra. Moreover, the decision of this Court in the case of *Standard Oil Co. v. United States*, 221 U. S. 1, introducing the "rule of reason" overruled in effect, though not expressly, the previous decisions of the Court, construing the statute to embrace every restraint of trade. *Freight Ass'n. Case*, 166 U. S. 318.

Even the strict adherence of the English Courts to the principle of stare decisis will give way in the face of newly discovered legislative action. See *Reed v. Bishop of Lincoln* [1892] A. C. 644, 655; *London Street Tramways v. London County Council* [1898] A. C. 375, 379.

III. THE HISTORY OF SECTION 6 OF THE CLAYTON ACT CONCLUSIVELY DEMONSTRATES THAT CONGRESS INTENDED TO GIVE LABOR UNIONS A LIMITED IMMUNITY FROM BEING HELD OR CONSIDERED TO BE COMBINATIONS IN RESTRAINT OF TRADE UNDER THE ANTI-TRUST LAWS.

A. Section 6 of the Clayton Act was intended to change the construction given to the Sherman Act by the courts.

In order to understand the provisions of Section 6 and how they came to be, we must examine the origin of the Sherman Act and its construction by the Courts.

We shall see, *first*, that there is substantial reason to believe that Congress in passing the Sherman Act did not intend it to apply to labor unions, *second*, that the decision of this Court applying the Sherman Act to labor unions rests upon doubtful grounds and, *third*, that it set in motion an organized movement to amend the Act to overcome the decision and to grant the exemption and immunity originally supposed to be contained in the law.

We take this background into account because it is to be noted that in his famous study on Section 34 of the Judiciary Act upon which the Supreme Court relied when it overruled the *Swift v. Tyson* rule, Mr. Warren laid stress upon the background of Section 34 as being in response to promises made at the time the Constitution was adopted, that the diversity citizenship jurisdiction of the Federal Courts would be narrowly restricted.

> Warren, *New Light on the History of the Federal Judiciary Act of 1789.* (1923), 37 Har. L. Rev. 49, 85.

In the *Dickinson Industrial Site* case, supra, this Court pointed out that the amendments were intended to eliminate the previous confusion between discretionary appeals and appeals as of right under the bankruptcy laws. And in the case of *Omaechevarria v. Idaho*, supra, this Court referred to the background of legislative attempts to settle the conflicting claims of sheep herders and cattlemen to the use of public lands.

1. Congress in passing the Sherman Act did not intend it to apply to labor unions.

In searching for the meaning which Congress intended to attach to the words used in the Sherman Act

it is important to bear in mind the purpose which the law was intended to accomplish. See, Landis, op. cit. supra.

The fundamental purpose of the Act has been stated by this Court. In the *Standard Oil* case, 221 U. S. 1, 50, it was said:

> "The debates show that doubt as to whether there was a common law of the United States which governed the subject in the absence of legislation was among the influences leading to the passage of the Act. They conclusively show, however, that the main cause which led to the legislation was the thought that it was required by the economic conditions of the times; that is the vast accumulation of wealth in the hands of corporations and individuals, the enormous development of corporate organizations, the facility for combination which such organizations afforded, the fact that the facility was being used, and that combinations known as trusts were being multiplied, and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally."

In this statement, this Court repeated the words of the sponsors of the measure, Senator Sherman, who opened the debate on the bill with these words on its purpose:

> "It is to arm the Federal Courts within the limits of their Constitutional power, in checking, curbing and controlling the most dangerous combinations that now threaten the business, property and trade of the people of the United States. As for one, I do not intend to be turned from this course by fine spun Constitutional quibbles or by the plausible pretexts of associated or corporate wealth and power. . . . The popular mind is agitated with problems that may disturb the social

> order, and among them none is more threatening than the inequality of conditions of wealth and opportunity that has grown up within a single generation out of the concentration of capital into vast combinations to control production and trade and to break down competition." (21 Cong. Rec. 2457, 2460.)

At the time of the 1890 Congressional debate it could not be supposed that the menace to American industry came from organized labor. The Knights of Labor had passed its zenith and "by 1890 they were a negligible factor and in a short time then passed into the limbo of dead experiments." Beard, *History of the United S s*, p. 608. And the American Federation of Labor had only just been organized.

That the purpose of the law was to restrain business combinations which thwarted a conception of free competition is likewise clear from the numerous studies of historians and economists who have written on the subject of the anti-trust laws.

J. D. Clark, *Federal Trust Policy* (1931).
W. S. Stevens, *Industrial Combinations and Trusts* (1913).
M. B. Watkins, *Industrial Combinations and Public Policy* (1927).
Berle & Means, *The Modern Corporation and Private Property* (1937).
John Moody, *The Truth About the Trusts* (1904).
O. W. Knauth, *The Policy of the United States Towards Industrial Monopoly* (1914).
Chicago Conference on Trusts (1890).
W. Z. Ripley, *Trusts, Pools and Corporations* (Rev. Ed. 1916).

Placed against the background of its fundamental purpose, the history of the language used in the Sher-

man Act as it evolved out of Congressional debates amply supports the contention that the Sherman Act was not intended to apply to labor unions. See Berman, *Labor and the Sherman Act* (1934).

The original bill as adopted in the Senate condemned as illegal any combination "made with a view or which tends to advance the cost to the consumer of any such articles."[1]

As a consequence several Senators immediately pointed out that this provision would necessarily include labor unions and farmers' organizations because their activities were directed to increasing the wages and prices which they received and thus increase the price of the product to the consumer.

See statements of following,

> Senator George, 20 Cong. Rec. 1459; Senator Teller, 21 Cong. Rec. 2562; Senator Stewart, 2565. Berman, *op. cit. supra*, Ch. II.

Senator Sherman himself stated that he did not intend by his bill to reach labor unions. 21 Cong. Rec. 2562.

The issue was drawn in the debate between Senators Hoar and Edmunds.

Senator Edmunds argued that there should be no difference between the treatment of labor and capital. He said:

> "The fact is that this matter of capital . . . and of labor is an equation, and you cannot disturb

[1] S. 1, 51st Cong., 1st Sess. The bills and debates on the Sherman Act are collected in Bills and Debates in Congress Relating to Trusts, Senate Doc. No. 147, 57th Cong., 2d Sess. (1903) hereinafter referred to as *Bills and Debates*. The Sherman Bill is found at 1 *Bills and Debates*, 71.

one side of the equation without disturbing the other. . . . If we are to have equality, as we ought to have, if the combination on the one side is to be prohibited, the combination of the other side must be prohibited or there will be certain destruction in the end." (21 Cong. Rec. 2727, Berman, *op. cit. supra*, p. 25).

In reply, Senator Hoar stated the basic theory which makes the anti-trust laws inapplicable to labor unions.

"If I correctly understood the Senator from Vermont . . . he thought that the applying to laborers in this respect a principle which was not applied to persons engaged in the large commercial transactions which are chiefly aimed at by this bill was indefensible in principle. Now it seems to me that there is a very broad distinction, which, if borne in mind, will warrant this exception to the general provision of the bill.

"When you are speaking of providing to regulate the transactions of the men who are making corners in wheat, or in iron, or in woolen or in cotton goods, speculating in them, or lawfully dealing in them without speculation, you are aiming at a mere commercial transaction, the beginning and end of which is the making of money for the parties, and nothing else. . . . The laborer who is engaged lawfully and usefully and accomplishing his purpose in whole or in part in endeavoring to raise the standards of wages is engaged in an occupation, the success of which makes Republican government itself possible and without which the Republic cannot continue to exist.

"I hold, therefore, that as legislators we may constitutionally, properly and wisely allow laborers to make associations, combinations, contracts, agreements for the sake of maintaining and advancing their wages, in regard to which, as a rule, their contracts are to be made with large corporations who are themselves but an association or

combination or aggregation of capital on the other side. When we are permitting and encouraging that, we are permitting and encouraging what is not only lawful, wise and profitable, but absolutely essential to the existence of the commonwealth itself.

"When, on the other hand, we are dealing with one of the other classes, the combinations aimed at chiefly by this bill, we are dealing with a transaction, the only purpose of which is to extort from the community, monopolize, segregate, and apply to individual use, for the purposes of individual greed, wealth which ought properly and lawfully and for the public interest to be generally diffused over the whole community." (21 Cong. Rec. 2728).

As a consequence of this debate the Senate passed two amendments to the Sherman Bill which expressly exempted labor unions:

"That this Act shall not be construed to apply to any arrangements, agreements, or combinations between laborers, made with the view of lessening the number of hours of their labor or of increasing their wages; nor to any arrangements, agreements, associations or combinations among persons engaged in horticulture or agriculture, made with a view of enhancing the price of their own agricultural or horticultural products."[1]

The bill encumbered with numerous other amendments was then referred to the Judiciary Committee which reported it out in its present form. In the debate that followed the bill as reported out, no men-

[1] 1 *Bills and Debates*, p. 411. This amendment was passed on March 25, 1890, 21 Cong. Rec. pp. 2611-2612. On the next day the substance of this amendment was offered again by Senator Aldrich and promptly passed. 21 Cong. Rec. pp. 2654-2655. See Berman, *op. cit. supra*, pp. 21-22.

tion was made of labor unions. The entire attention of the Senators appeared to be directed to a single question:

> Was or was not the measure well constructed to restrain the undesirable activities of business combinations. (Berman, *op. cit. supra*, p. 31.)

In the Senate debate, after the bill was reported from the Judiciary Committee, Senator Hoar said that the bill was an answer to the complaints

> "from all parts and all classes of the country of these great monopolies which are a *menace to Republican institutions*. . . . We have affirmed the old doctrine of the common law in regard to all interstate and international *commercial* transactions." (Italics added.) (21 Cong. Rec. 3146.)

It requires no processes of psychoanalysis to urge that Senator Hoar, who had previously declared that the anti-trust laws could not apply to labor organizations because they were necessary to the existence of Republican institutions and were not commercial transactions, did not intend to include them in a bill directed toward organizations menacing Republican institutions and relating only to commercial transactions.

None of the Senators who had objected to the original bill on the ground that it might be construed to affect labor unions objected to the bill as reported out by the Judiciary Committee and the Senate as a whole

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* There is some question as to the authorship of the bill as reported out by the Judiciary Committee. Senator Hoar's claim has been disputed by Edmunds, who stated that it was the joint product of the entire Committee. See Hoar, *Autobiography of Seventy Years*, 364; Sen. Hearings, 62d Cong. pursuant to S. Res. 98, p. 2424; Clark, *Federal Trust Policy* (1931) p. 43; Boudin, *The Sherman Act and Labor Disputes* (1939) 39 Col. L. Rev., p. 1288-1293.

which had twice adopted the Sherman amendment, passed the bill in its final form.

The only reference in the House of Representatives to labor unions came in the remarks of Representative Stewart on June 11th, 1890, in a discussion of the bill as reported by the House and Senate conferees. Stewart criticized the bill on the ground that he thought that it would compel unwise competition among the railroads, and remarked:

> "Why do the laborers organize and combine to put up the price of labor, and so enhance the cost of everything to the consumer? Because of excessive competition. Yet my friend from Missouri Rep. Bland) does not propose to apply any remedy in that direction. Nothing more largely affects the cost of articles to every consumer . . . than the combinations of labor. Who complains of it? I do not. I think the laborer is justified, where competition is excessive . . . in entering into combinations for self-protection." (21 Cong. Rec. 5956.)

Hence, the only evidence in the House debate shows that the bill was not intended to apply to labor unions.

The legislative history of the Sherman Act has been soberly summarized by one scholar as follows:

> "During the debates upon the Sherman Bill, the broad language of the prohibition of all agreements in restraint of competition caused more than one legislator to ask reassurance that the law if enacted, would not affect labor unions and the New York *World* considered such to be so clearly the effect of the bill that it definitely opposed the measure on that very ground. Despite this forecast of the significance of the provisions of the proposed law the Congressional leaders were so confident that no such construction could be

placed upon the Act that they failed to eliminate the possibility by explicit proviso excepting combinations of labor." (J. D. Clark, *op. cit. supra*, p. 55.)

2. The decision of the Court construing labor organizations to be combinations in restraint of trade cannot be supported.

In criticizing the decision of the Court in the Danbury Hatters case (*Loewe v. Lawlor*, 208 U. S. 274), we are willing to concede that Congress made no express exemption of labor unions in the Sherman Act. But, by the same token, neither did it expressly include labor organizations and the decision of the Court construing the act to apply to labor unions is simply a piece of judicial construction that amounts to judicial legislation.

It is therefore fair to take the opinion of the Court upon its own reasoning and to demonstrate that it is without reasonable support.

In the Danbury Hatters case the Court held that the circulation of an unfair list by the Hatters' Union urging organized labor not to patronize concerns that sold hats manufactured by non-union employers was a restraint of trade within the meaning of the Sherman Act. To explain its construction of the law the Court in its opinion said as follows:

> "The Act made no distinction between classes. It provided that 'every' contract, combination, or conspiracy in restraint of trade was illegal. The records of Congress show that several efforts were made to exempt, by legislation, organizations of farmers and laborers from the operation of the Act and that all these efforts failed, so that the Act remained as we have it before us."

"In an early case, *United States v. Workingmen's Amalgamated Council*, 54 Fed. Rep. 994, the United States filed a bill under the Sherman Act in the Circuit Court for the Eastern District of Louisiana, averring the existence of a 'gigantic and widespread combination of the members of a multitude of separate organizations for the purpose of restraining the commerce among the several States and with foreign countries,' and it was contended that the statute did not refer to combinations of laborers. But the Court, granting the injunction, said:

> "'I think the Congressional debates show that the statute had its origin in the evils of massed capital; but when, the Congress came to formulating the prohibition, which is the yardstick for measuring the complainant's right to the injunction, it expressed it in these words: "Every contract or combination in the form of trust, or otherwise in restraint of trade or commerce among the several States or with foreign nations, is hereby declared to be illegal." The subject had so broadened in the minds of the legislators that the source of the evil was not regarded as material, and the evil in its entirety is dealt with. They made the interdiction include combinations of labor, as well as of capital; in fact, all combinations in restraint of commerce, without reference to the character of the persons who entered into them. It is true that this statute has not been much expounded by judges, but, as it seems to me, its meaning, as far as relates to the sort of combinations to which it is to apply, is manifest, and that it includes combinations which are composed of laborers acting in the interest of laborers.'" (208 U. S. 301-302.)

Thus, the Court construed the Act by resort to three grounds: first, that the language of the Act in terms applied to every combination in restraint of trade and

therefore afforded no room for exemptions; second, the efforts to obtain express exemptions from Congress had failed; and, third, judicial precedents sustained the application of the Act to unions.

A close analysis reveals that each of these grounds is without support.

First. The language of the Act is not conclusive. The absence of any express exemption is more reasonably explained (a) by the principle advanced by the sponsors of the Act that an anti-trust law in its nature deals only with business combinations; (b) the fact that the Senate twice passed amendments to the bill in its original form expressly exempting unions; and (c) the change in the language of the bill from its original form made express exemptions unnecessary.

Second. The fact that previous attempts had been made to amend the law is of little value. This Court has refused to give any considerable weight to the fact that Congress has failed to adopt amendments which would clarify what appeared to the courts to be a doubtful point.

Erie Railroad Co. v. Tompkins, supra.
Helvering v. Hallock, supra.

Equally important is the fact that the Court's reference to the records of Congress concerning prior legislation and efforts to amend the law is in error. The Court apparently relied upon the briefs of counsel for the manufacturer who inadequately set forth the legislative history.

48 Transcipts of Records (1907) No. 389, Brief for Plaintiffs in Error, pp. 30-34.

An actual study of the bills discloses that each of them, with one exception, were proposals to amend the

entire Sherman Act to strengthen it by making specific reference to illegal combinations to prevent competition and to raise prices. As can be readily understood from the history of the Congressional debate which we have set forth above, any such measure would have required a specific exemption of labor. The one exception (S. 1546, 55th Cong. 1897) merely provided for an amendment to the Sherman Act exempting labor and farmers' organizations. However, this bill was never even reported out of committee and in the absence of any consideration given to it, it is hardly any evidence whatsoever of Congressional intent. Berman, *op. cit. supra*, pp. 80-87.

Third. The precedent relied upon by the Court in the case of *United States v. Workmen's Amalgamated Council* is of exceedingly little value. That case was an application for an injunction, but at the time of the hearing the strike had terminated so that the case was in fact moot and no injunction should have issued. *Leader v. Apex Hosiery Co.*, 302 U. S. 656.

Moreover, the opinion of Judge Billings in the District Court is little better than an invective against labor unions and an unjustifiable revival of ancient doctrines of conspiracy. Judge Billings himself relied upon the decision of *People v. Fischer*, 14 Wend. 18, in which the Court ruled that workers combining to raise wages were unlawfully combining to ruin the business of their employer, even though each of them singly could have sought a wage increase, a ruling that by no means can be taken to represent valid legal doctrine. The case of *Commonwealth v. Hunt*, 4 Metc. (Mass.) 111 had set aside the doctrine that a mere combination of workers was in itself unlawful. And the decision of Judge Pound in the case of *Cleland v. Anderson*, 66 Neb. 252,

made prior to the *Danbury Hatters* case, afforded ample precedent to support the construction of the anti-trust laws as exempting labor unions. Judge Pound said:

> "If laborers are clearly within the general scope and reason of the Act, so that the provisions exempting them from its operation arbitrarily permit them to do acts in contravention of its terms and purposes which are forbidden to the public at large, there can be no doubt that the statute must fail. . . . We think the statute is constitutional and valid. In its letter and spirit it refers only to combinations and conspiracies of persons engaged in the manufacture, sale and transportation of goods, wares and merchandise to prevent or hinder competition and regulate and control prices. Any express exception of organizations of laborers intended to maintain or advance wages was not necessary to exempt them from its operation. The section in question is inserted, rather, out of abundance of caution to prevent judicial extension of the terms of the Act beyond its scope and purpose, than to grant a privilege or immunity to persons, who would otherwise fall within its terms.
>
> "The distinction between goods and merchandise produced by skill and labor and skill and labor which produced them is manifest and reasonable. The statute does not say that laborers who have goods, wares or merchandise, the product of labor, for sale may combine to advance or control the price, but only that the law designed to prevent combinations in restraint of trade in such article, when produced, shall not be construed to affect organization formed to regulate the wages or compensation of the laborer and skill which produced them." (66 Neb. pp. 259-261.)

The statement of Judge Billings, quoted by the Court to the effect that the subject had so broadened in the minds of the legislators as to include every com-

bination in restraint of trade is simply an arbitrary statement without any foundation in fact.

3. The decision of the Court set in motion an organized drive to amend the law.

The reaction to the decision of the Court in the *Danbury Hatters* case was immediate and intense. Organized labor issued a statement condemning the decision as being a perversion and distortion of the law. See Gompers, editorial, *American Federationist*, January, 1908, reprinted 2 Sen. Hearings, Interstate Commerce Committee, 63d Cong. pursuant to S. Res. 98 (1913), pp. 1740-1752. See also Clark, *op. cit. supra*, p. 55; Berman, *op. cit. supra*, p. 99. To labor the decision represented the culmination of the growing use of injunctions in labor disputes, a development of the judicial process that had taken sudden and swift form during the preceding years. See Frankfurter & Greene, *The Labor Injunction*, pp. 17-24. It should be noted that Section 20 of the Clayton Act was intended to meet the evil of injunctions and contempts entirely apart from the anti-trust laws.

Labor steadfastly believed that it had been given an immunity against the operation of the Sherman Act by the Senators who were responsible for its passage. Samuel Gompers testifying before the Senate Committee in 1913 said:

> "At the time of passage of the Sherman Act speaking with Senators Blair and George and others, but particularly my memory serves me well in regard to these two men, they gave me the actual assurance, and gave my associates the actual assurance that although the bill did not contain the language directly excluding the organizations of work-

ing people, yet by no means of construction could it be made to apply to voluntary associations of labor." (2 Sen. Hearings, *op. cit. supra*, p. 1740.)

During the course of the inquiry by the United States Commission on Industrial Relations, Commissioner Lennon answered an assertion by one of the most famous anti-labor lawyers of the day who said that the Sherman Act was intended to apply to labor unions:

> "I had the pleasure of interviewing Senator Sherman and Senator Plumb and a large number of gentlemen in the Senate at the time, and they did not look upon it in that way." 16 Report of U. S. Commission on Industrial Relations (1916) p. 10654.

During the debates on the Clayton Act, Congressman Towner, speaking of the passage of the Sherman Act, said:

> "When the reason for the omission of the Senate amendment (exempting labor unions) was demanded, Senator George and Vest stated that the amendment had not been included because it was not necessary." (51 Cong. Rec. 9547)

A reading of the debate on the Clayton Act will show that a motivating factor in the passage of Section 6 was the belief that the Act had been misconstrued when the Court held in the *Danbury Hatters* case that labor unions could be a combination in restraint of trade. See, especially, 51 Cong. Rec. 9540 and infra.

We have set forth the history of the Sherman Act and its enforcement to show that the decision of the Court construing it to apply to labor unions was ill-founded and gave rise to immediate and pressing demands for amendments to overcome this construction

and application. It is to be borne in mind that the decision in the Danbury Hatters' case did *not* hold that labor unions as such were combinations in restraint of trade nor was any decree entered dissolving the union. The decision condemned as a restraint of trade the activities of labor unions in the form of a boycott.

B. The legislative records amply demonstrate that Section 6 of the Clayton Act was intended to confer upon labor unions a limited immunity under the anti-trust laws.

1. The amendment of the Sherman Act became a major political issue.

The agitation to overcome the effect of the Danbury Hatters' case immediately took on the proportions of a National issue. The Democratic Party Convention of 1908 adopted a plank promising labor this relief:

> "The expanding organization of industry makes it essential that there should be no abridgment of the right of wage earners and producers to organize for the protection of wages and the improvement of labor conditions to the end that such labor organizations and their members should not be regarded as illegal combinations in restraint of trade." (51 Cong. Rec. 9544)

In 1912 the Democratic Platform repeated this pledge.

In his testimony before the Senate Committee, Gompers disclosed that in 1909, President Taft had promised to support legislation that would exempt labor unions. Gompers quoted Taft as follows:

> "He was of the opinion that these organizations of working people should not come under the oper-

ations of the Sherman anti-trust law." (2 Sen. Hearings, *op. cit. supra* 1765)

Two bills were introduced in 1913-1914 to amend the Act to exempt labor unions following the Danbury Hatters' case, the Wilson Bill [7] and the Bacon-Bartlett Bill.[8]

2. At the hearings on the Clayton Act, labor and progressive groups sought a limited immunity.

Voluminous hearings were held both by the House and Senate Committees prior to the introduction of the Clayton Bill. (Hearings before House Judiciary Committee, 63d Cong. 2d Sess. (1914); Sen. Hearings, *op. cit. supra.*

The important thing to note about these hearings is that they were primarily concerned with the tremendous growth of industrial combinations since 1890 despite the Sherman Act, and the consequent problem of making the Act effective in its purpose. The question of exempting labor unions was raised before both committees by representatives of organized labor.

In the Senate the following colloquy summarizes the position taken by organized labor:

> "Senator Cummins: Your view is that the anti-trust law which was intended to prevent restraints of trade and monopolies, ought not to apply at all to labor organizations."

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[7] H. R. 11033, 62d Cong. 1st Sess.:

"That nothing in the Act of July 2d, 1890 . . . is intended, nor shall any provision thereof hereafter be enforced so as to apply to organizations or associations not for profit and without capital stock, nor to the members of such organizations or associations as such." See testimony Gompers, 2 Sen. Hearings *op. cit. supra*, p. 1760.

[8] H. R. 1873, 63d Cong. 1st Sess. Text at 51 Cong. Rec. p. 9544.

Mr. Gompers: Yes, sir. (2 Sen. Hearings, p. 1762)

In the House of Representatives, after testifying, organized labor submitted a letter to clarify its position, which was sent to all members of Congress, in which it urged the following amendment:

> "That nothing contained in the anti-trust laws shall apply to fraternal, labor, consumers, agricultural, horticultural organizations, orders or associations instituted for the purpose of mutual help and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations, orders, or associations from carrying out the legitimate objects thereof." (House Hearings, p. 1808)

At the hearings, the only opponent of organized labor was Daniel Davenport, who was the attorney for the hat manufacturer in the *Danbury Hatters'* case and represented the American Anti-Boycott Association, an organization of employers opposed to the development of collective bargaining. But it is to be remembered that the President and the Congress elected in 1912 did not represent men like Davenport.[9]

By contrast, the testimony of Mr. Justice Brandeis, then a private citizen, indicates that this demand on the part of organized labor was supported by the progressive movements of the country. In his appearance before the Senate Committee, Mr. Brandeis opposed

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[9] "On the 4th day of March, 1913, the Democrats gained control of every branch of the national government." Congressman Barkley, 51 Cong. Rec. 9555, urging the adoption of the Henry amendment. See Landis, *op. cit. supra*, p. 891, where speaking of the British labor laws, he writes: "To deal, for example, with the Trades Disputes Act of 1906 without regard to the fact that it followed upon a Liberal-Labor victory, would be to thwart known legislative hopes and desires."

including labor under the regulations of the anti-trust laws: (Sen. Hearings, pp. 1180-1181).

> Senator Newlands: Do you think this movement for regulation of the unions of capital, will, or ought to be, followed by regulation of the unions of labor.
>
> Mr. Brandeis: I do not believe that the conditions in America are such that we are in any appreciable danger from the trade unions, except that danger of their unwisdom which is inherent in man . . .
>
> Senator Newlands: In other words, you do not think that the labor union constitutes the same menace to society that the capitalistic union does.
>
> Mr. Brandeis: I do not.
>
> Senator Newlands: But if it does, you would be prepared to act.
>
> Mr. Brandeis: Absolutely, I think. Society must protect itself."

3. Section 6 of the Clayton bill as originally introduced in the House only protected labor unions against dissolution.

Upon the hearings held in 1913-1914, the House Judiciary Committee reported out Section 6 of the Clayton Bill relating to labor unions in the following form:

> "that nothing in the anti-trust laws shall be construed to forbid the existence and operation of fraternal, labor, consumers, agricultural or horticultural organizations, orders, associations, instituted for the purpose of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations, orders, or associations from carrying out the legitimate objects thereof." (H. Rept. No. 627, 63d Cong. 2d Sess. to accompany H. R. 15657. In this form and as it went through Congress, Section 6 was numbered Section 7, and is so designated in the debates, which we quote *infra*.)

The report itself stated that this provision was only intended to protect the existence of labor unions against dissolution for violation of the anti-trust laws. It said:

> "In the light of previous decisions of the courts and in view of the possible interpretation of the law which would empower the Court to order the dissolution of such organizations and associations, your committee feels that all doubts should be removed as to the legality of these organizations and associations and that the law should not be construed in such a way as to authorize their dissolution by the courts under the anti-trust laws." (House Rep. 627, 63d Cong. 2d Sess. pp. 14-16; See also Minority Views)

Because of its narrow scope, the bill was attacked by several Congressmen. See, for example, statement of Congressman Floyd (51 Cong. Rec. 9166); McDonald (9249); Volstead (9082). But these remarks and the report were made prior to the introduction of the Henry Amendment. Cf. *Frankfurter and Green*, op. cit. supra, pp. 143-144.

4. The Henry Amendment was introduced to overcome the objections to Section 6 in its original form.

On June 1st, 1914, the so-called Henry Amendment was introduced on the floor of Congress when the debate on the bill was resumed. It added to Section 6 the following clause:

> "Nor shall such organizations, orders, or associations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade under the anti-trust laws." (51 Cong. Rec. 9538)

The debate on the amendment is illuminating and deserves full reading. It is to be found in 51 Congres-

sional Record at pp. 9538-9569. It is impossible to do full justice to the conclusive evidence of the intent of Congress which it discloses. It is complete in its reference to the original debates on the Sherman Act, the intended change in its enforcement, the drive for amendments, the political movements, and the authors of the text of the section.

The Henry Amendment, though nominally introduced by Mr. Webb, chairman of the Judiciary Committee, was in fact the work of Congressman Henry of Texas, chairman of the powerful Rules Committee. In introducing the amendment, Congressman Webb deprecrated its significance, but in the light of the actual authorship of the bill and the statement of its authors, his remarks are not to be given the usual weight accorded to the sponsor of an amendment. Congressman Henry explained his amendment so clearly and explicitly that we do not understand how any doubts could have arisen. We quote at length from it because it sets out all of the evidence of the history behind this bill:

> "Mr. Henry: Mr. Chairman, there has been so much controversy about what was intended when the original Sherman Anti-trust Law was passed that I think we should make clear just what was intended by this law. Some of us do not believe Section 7 as originally written by the Committee on the Judiciary expressed exactly what should be in this bill. Therefore, we took exception to the language of the first part of the paragraph in Section 7 and insisted there should be additional language. Among those who agreed that the language was not plain enough were the gentleman from North Carolina, Mr. Kitchin; the gentleman from Illinois, Mr. Hinebaugh; the gentleman from Illinois, Mr. Graham; the gentleman from Iowa, Mr. Towner; the gentleman from Maryland, Mr.

Lewis, and myself. We met to confer, and concluded that we ought to make the language more explicit. In that conference held in the committee room of the Committee on Rules, on the evening of May 21st, 1914, we agreed that this language should be added at the end of the first paragraph of Section 7, to wit, after the word 'thereof': 'Nor shall such organizations, orders, or associations or the members thereof be held or construed to be illegal combinations or conspiracies in restraint of trade under the anti-trust laws.'

"This language I have read is exactly the verbiage used by the gentleman from North Carolina (Mr. Webb) in the amendment offered by him and is the amendment agreed upon by Mr. Kitchin and our conferees in my office. The Committee on the Judiciary courteously accepted the language as prepared by the gentlemen in the conference, believing I assume that we were correct and that the original language used by them was not quite explicit. So we came to a satisfactory agreement with the House Judiciary Committee about this addition to the first part of Section 7, and, so far as I am concerned we are standing squarely with the committee for that paragraph with our added language. We called into the conference with us the heads of the American Federation of Labor and submitted this amendment to them, and said to them that we believed its adoption as an addition to Section 7 would clearly exempt labor organizations and farmers' organizations from the provisions of the anti-trust laws.

"They agreed with us; they called their counsel into the conference with them and with us and we all concurred that this amendment added to the paragraph of Section 7 would give these organizations what they have desired so long, and all they have been struggling for since the original enactment of the Sherman anti-trust law.

"In my judgment, when Congress was dealing with 'combinations in restraint of trade' it never

intended that the law should apply to labor organizations or farmers' organizations without capital and not for profit. The courts took a different view of it and construed the Act as it was never intended that it should be interpreted. The time has come when we can correct that error and write the language in the law as those gentlemen insist that it should be and should have been . . .

Congressman Henry then went on to recite previous proposals to exempt labor unions dating from the original debate on the Sherman Act and stated that the amendment carried out the purpose of each of these proposals. He continued:

"Now, gentlemen, organized labor has never asked that they be permitted under the law to commit crimes or to do unlawful things. They have never come to this government and pleaded for special privileges. They have never asked for anything to which they are not entitled at our hands. They have said that when we are dealing with conspiracies in restraint of trade and combinations and trusts it was never intended that the man who sells his labor—his God-given right—should be classed as conspiring against trade or unlawful combinations against the anti-trust laws. We are now about to correct that error, and make it plain and specific, by clear-cut and direct language that the anti-trust laws against conspiracies in trade shall not be applied to labor organizations and farmers' unions.

When, as chairman of the Committee on Rules, I had the honor to present the resolution bringing up for consideration this bill and the Democratic administration anti-trust program, it was my privilege to announce that section 7 of this anti-trust bill was not satisfactory to labor, and that I heartily concurred in that view; and that a plain provision clearly exempting them from the anti-trust laws would be presented and adopted by the House.

We have prepared such provision, and the gentleman from North Carolina (Mr. Webb) has presented it for us as labor and the farmers wish it. In the beginning of my remarks it is set out as approved by labor, the Committee on the Judiciary, the Democratic President, and skilled legal counsel for the wage earners. It is apparent that in a few brief moments it will be adopted by an overwhelming vote of the House. This executes the meritorious and just contract the Democratic Party has made with labor; and I rejoice that I am here to witness and participate in the triumph of the honorable men who win their bread by the sweat of their brow." (51 Cong. Rec. 9540-1951)

As this measure was debated Congressman after Congressman announced that at last the grave injustice committed by the Courts was to be corrected and the original intent of the sponsors of the Sherman Act to exempt labor unions was now to be made so positive that no Court could misconstrue it.

See, for example:

Bartlett,	51 Cong. Rec. 9542-9544
Konop,	51 Cong. Rec. 9545-9546
Towner,	51 Cong. Rec. 9548
Johnson,	51 Cong. Rec. 9549
Hensley,	51 Cong. Rec. 9551
Raker,	51 Cong. Rec. 9551-9552
Barkley,	51 Cong. Rec. 9552-9555
Hamlin,	51 Cong. Rec. 9556
Crosser,	51 Cong. Rec. 9555-9556
Casey,	51 Cong. Rec. 9557
Lewis (Md.),	51 Cong. Rec. 9565
La Follette,	51 Cong. Rec. 9573-9574

We would like to quote Congressman Lewis:

> "I challenge the gentlemen of this House to say that Congress would have ever said to the toiler: If you overstep the line and commit a tort, you shall be subject to threefold damages . . . There is a distinction between labor and a barrel of oil, a commodity: labor is never in truth a commodity." (51 Cong. Rec. 9565)

The Henry Amendment was adopted without a single dissent: 207 ayes, no nays (51 Cong. Rec. 9567).

5. The Thomas and McDonald Amendments proposing to grant labor a broader immunity were rejected as already embraced in the Henry Amendment.

During the debate on the Henry Amendment, the question was raised whether the Henry Amendment was sufficiently clear to express its purpose. These expressions of doubt came both from advocates of labor and from conservative members who did not believe that labor should be exempted. Their remarks have sometimes been believed to cast doubt upon the meaning of the Henry Amendment. See Rep. Thomas, 51 Cong. Rec. 9544; McDonald, 9545; cf. Frankfurter and Greene, *op. cit. supra*, p. 144. But this doubt is dispelled by the fact that two substitute proposals made by those who believed the Henry Amendment did not go far enough were rejected as unnecessary. The two proposals were dealt with together in the debate. Congressman Thomas proposed the following:

> "The provisions of the anti-trust laws shall not apply to agricultural, labor, or consumers, fraternal or horticultural organizations, orders and associations." (51 Cong. Rec. 9566)

Immediately after Congressman Thomas had proposed his amendment, Congressman McDonald offered the following substitute amendment to the Thomas Amendment, which would have made Section 6 read as follows:

> "Nothing contained in the anti-trust laws shall apply to trade unions or other labor organizations organized for the purpose of regulating wages, hours of labor or other conditions under which labor is to be performed, nor to any arrangements, agreements or combinations among persons engaged in horticulture or agriculture made with a view to enhancing prices of their own agricultural or horticultural products; nor to fraternal or consumers organizations, orders or associations, instituted for the purposes of mutual help and not having capital stock or conducted for profit." (51 Cong. Rec. 9566-9567)

As the debate closed upon both of these amendments, the challenge was squarely raised by Congressman Thomas who claimed that the Henry (or Webb Amendment as it was referred to during the debates) Amendment was a compromise:

> Mr. Thomas: . . . Mr. Chairman, the gentleman from Colorado (Mr. Keating) a few moments ago, in interrogating the gentleman from North Carolina (Mr. Webb) stated that this amendment is just what organized labor wanted. Is it not a fact that organized labor wanted to exempt organized labor entirely from the operation of the anti-trust law, such as is not here offered, and was not this Webb amendment simply the result of a compromise?
>
> Mr. Keating: If I had the time, Mr. Chairman, I would be very glad to answer that question.

Mr. Thomas: That could be answered by yes or no.

Mr. Keating: The amendment proposed by the gentleman from Kentucky (Mr. Thomas)——

Mr. Thomas: Mr. Chairman, I object to the gentleman's making a speech in my time. I simply asked him a question.

Mr. Keating: I have to answer the question clearly. The amendment offered by the gentleman from Kentucky (Mr. Thomas) was considered by the representatives of organized labor, and they decided that the proposition submitted by Mr. Webb, of North Carolina, was a stronger proposition and more beneficial to labor organizations than the proposition submitted by the gentleman from Kentucky. (Applause)

Mr. Thomas: Is it not a fact that the Webb amendment was accepted by organized labor only after they came to the conclusion that they could not get the amendment that I submitted?

Mr. Keating: The statement which I made—and I made it very deliberately, because it was repeated to me since this House met, by a leader of organized labor, who is qualified and authorized to speak for organized labor—was that the amendment as submitted by the gentleman from North Carolina (Mr. Webb) was better, from the viewpoint of organized labor, than the Thomas amendment, which had been previously considered by the labor leaders. (Applause)" (51 Cong. Rec. 9569)

Both amendments were immediately put to a vote and defeated.

Thus, two substitute amendments offered upon the ground that the language of the Act as it now stands does not go far enough in exempting labor unions,

were defeated upon the specific explanation that the language as adopted had in fact embraced the meaning of the proposed substitutes. It is impossible to imagine what clearer guide there can be to legislative intent. See, example given by Dean Landis, *op. cit. supra*, p. 889, n. 12.

6. The debate in the Senate confirms the meaning of Section 6 as passed in the House, and the Culberson amendment was passed to dispel all doubts.

The bill as passed by the House was transmitted to the Senate on June 5th, 1914, and Section 6 of the House bill was reported by the Senate Judiciary Committee to the Senate virtually unchanged.

In the early stages of the Senate debate several Senators took the position that Section 6 as so reported did not completely exempt labor unions. Once again the attack was a mingled one, made both by the opponents and the proponents of labor immunity. See, for example, Senator Jones, 51 Cong Rec. 14013, and Thomas, 14020.)

When the debate was resumed on September 2nd, 1914, the issue was drawn between Section 6 as reported by the Senate Judiciary Committee with the Henry amendment and an amendment proposed by Senator Cummins. The whole of this debate is contained in Volume 52 of the Congressional Record, pp. 14585 to 14591, and deserves reading in full.

The Cummins amendment opened with the sentence that the "labor of a human being is not a commodity or article or commerce," but it went on to define the acts which labor unions might do and, by so defining,

limited the broad exemption of its opening sentence."[10] (See Senator Cummins' response to Senator Gallinger's question, 51 Cong. Rec. 14585.)

Senator Cummins introduced his amendment with the statement that he believed the bill as reported did not completely exempt labor unions. He said:

> "I precede the amendment I have offered with the statement that ought to be in the law somewhere, for it would solve many of the problems which have vexed the courts and vexed those who have discussed the question, namely, that the labor of a human being is not a commodity or article of commerce.
>
> ". . . if we do not recognize the difference between the labor of a human being and the commodities

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[10] Amendment intended to be proposed by Mr. Cummins to the bill H. R. 15657, 63 Cong. 2d Sess., Aug. 19, 1914. The full text of this amendment is as follows:

"Sec. 7. That the labor of a human being is not a commodity or article of commerce, and nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor organizations having for their objectives bettering the conditions, lessening the hours or advancing the position of labor, nor to forbid or restrain individual members of such organizations from carrying out said objectives in a lawful way; nor shall said laws be construed to prevent or prohibit any person or persons, whether singly or in concert, from terminating any relation of employment or from ceasing to work or from advising or persuading others in a peaceful, orderly way, and at a place where they may lawfully be, either to work or abstain from working, or even from withholding their patronage from a party to any dispute growing out of the terms or conditions of employment or from advising or persuading other wageworkers in a peaceful and orderly way so to do, and from paying or giving or withholding from any person engaged in such dispute any strike benefits or other monies or things of value, or from assemblying in a peaceful and orderly way for a lawful purpose in any place where they may lawfully be, or from doing any act or thing which might lawfully be done in the absence of such dispute. Nothing contained in said anti-trust laws shall be construed to forbid the existence and operation of agricultural, horticultural or commercial organizations instituted for mutual benefit without capital stock and not conducted for the pecuniary profit of either such organization or the members thereof, or to forbid or restrain such members from carrying out said objectives in a lawful way."

that are produced by labor and capital, we have lost the main distinction which warrants, justifies and demands that labor organizations coming together for the purpose of bettering the conditions under which they work, of lessening the hours which they work, and of increasing the wages for which they work, shall not be reckoned to be within a statute which is intended to prevent restraints of trade and monopoly." (51 Cong. Rec. 14585.)

Senator Culberson then suggested that Senator Cummins' objection could be met if the first sentence of his amendment were added to Section 6. When this suggestion was rejected by Senator Cummins, Senator Pittman took up the defense of Section 6 as reported and the following colloquy between him and Senator Cummins becomes extremely significant: (51 Cong. Rec. 14587-89).

"Mr. Pittman: Mr. President, I think the part of the Senator's amendment which describes labor and differentiates it from a commodity is very excellent; but I shall be unable to vote for the amendment because I do not believe it is as broad as the committee amendment. The bill as reported by the committee intends to exclude such organizations from the purview of this statute and I believe it does; and if I did not believe it did so I would offer an amendment to that effect. Here is the language: 'Nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade under the anti-trust laws.' Now if they cannot be held or construed to be illegal combinations or conspiracies then they are not subject to prosecution under this Act, or not subject to the jurisdiction of the court under this Act. The last clause of Section 7, which I have just read, carries out the very purpose of organized labor, that is to say, that this legislation has nothing to do with organized labor, that

it has nothing to do with organized farmers; that any unlawful acts committed in the pursuit of the objects of their organizations shall be tried and determined by other existing laws. That is what it means."

Mr. Cummins: "Mr. President, I simply wish to suggest to the Senator from Nevada that in my view he has stated just what Section 7 does not do. Section 7 still leaves every act of a labor union or any member of a labor union to be tested by the anti-trust law and its lawfulness must be determined by the provisions of the anti-trust law. That is precisely what I want to avoid by my amendment."

Mr. Pittman: "I am satisfied that the Senator believes that my construction of the committee amendment is wrong and that his construction of his amendment is right, because I know he is sincerely in earnest in this matter. It is simply a difference of opinion in regard to construction. I contend that the language of the committee section, 'instituted for the purposes of mutual help' is broader than the definition given to such societies by the Senator from Iowa. I further contend that unless his amendment contains this clause which is in the committee report, namely—

> 'nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade under the anti-trust laws'—

he does not remove them from the purview of this statute; but, on the contrary, subjects them to this statute, leaving to the court that tries the matter the determination as to whether or not the society comes within the definition laid down by the Senator.

Again, the Senator states in his amendment that nothing shall be done under this act to cause such societies to cease to exist. There are worse things against labor than the destroying even of their societies, so far as punishment is concerned. While

his amendment states that these unions shall not be dissolved if they come within this section, his amendment does not clearly say that these organizations shall not be tried or the members thereof shall not be tried under this act.

There are two distinct effects of the act. One of them looks to the dissolution of the union; the other one looks to the prosecution of the union or its members under the act. The Senator's amendment seems to me only to go to the first effect, the dissolution of the union, and does not protect the union or the members thereof against action under this act; while the Senate bill, or section 7, as reported by the committee, does have that effect when it says in very plain and distinct language that such organizations or the members thereof shall not be held or construed to be illegal combinations or conspiracies in restraint of trade under the anti-trust laws.

"I think that clause alone gives the greatest protection that the farmers and laborers of this country have under this act. I believe that clause, standing alone, would afford them the protection they are demanding. In plain language it says that those organizations and the members thereof shall not be subject to this act, and the amendment of the Senator from Iowa does not contain such a provision."

Senator Ashurst then tried to resolve the debate by suggesting that Senator Cummins take in the Henry amendment, insisted upon by Senator Pittman, as necessary to exempt labor unions. Although this was agreed to by Senator Cummins, both Senators Reed and Hughes stated that they would vote against the Cummins amendment because they believed that Senator Pittman was right and that the committee bill was broader than the amendment offered by Senator Cummins. A vote was then taken upon the Cummins

amendment and it was rejected. (51 Cong. Rec. 14590.)

Immediately thereafter Senator Culberson proposed the amendment to add the now famous clause. Just before the vote was taken, Senator Borah made the following statement:

> "I only want to say, however, that the time will come when Congress will have to modify its view upon that question in order to legislate upon subjects with reference to labor which we may desire to consider in the future. If labor is not a commodity nor an article of commerce in the sense in which that term is used in the Constitution, we shall be very much vexed at some time in the future when we are asked to do things for labor that we shall want to do to find the constitutional authority to do them. We are liable to find ourselves very much limited in our power to deal with labor questions should be finally adopt the view here expressed." (51 Cong. Rec. 14591.)

The Culberson amendment was carried without a record vote. (51 Cong. Rec. 14591.) Thus it becomes clear that, just as in the House the Henry amendment was added in order to meet the specific objection that the bill would not accomplish its intended purpose of exempting labor unions, so in the Senate the Culberson amendment was added for the very same reason, while at the same time, a substitute amendment narrowing the exemption was rejected. Although the significance of this clause has been ignored, and some have tended to regard it as a mere rhetorical question, the debates prove its actual significance.

The possible argument that the Senate may have believed that the Cummins amendment went further than Section 6 and was therefore undesirable is conclusively

rebutted by the statements made prior to its rejection and by the adoption of the Culberson amendment. In its context, the meaning of the statement that "labor is not a commodity" is simply that since the jurisdiction of Congress to enact the anti-trust laws depended upon the interstate commerce clause, by defining labor as being no part of commerce, Congress had taken it from under the jurisdiction of the anti-trust laws.

When the whole bill was reported to the House upon the conference report, Congressman Volstead expressed his fear that the Culberson amendment went too far in exempting unions from all federal legislation. (51 Cong. Rec. 16283.)

It should further be noted that in the House, even the critics of the Henry amendment conceded that the principle of labor not being a commodity carried with it as a necessary implication, its complete exemption from the provisions of the Sherman Anti-trust Law.

Congressman Murdoch, one of these critics, said:

> "I am in favor of a law here which will directly in terms exempt labor unions from the provisions of the Sherman Anti-trust Law. I do so because I believe labor is not a commodity." (51 Cong. Rec. 9568.)

Moreover, as we have pointed out above, this declaration is implied in the fundamental statement by Senator Hoar of the principle which exempts labor unions from any anti-trust laws even without any express exemption to that effect.

7. The defeat of the Gallinger Amendments in the Senate is final and conclusive proof that Section 6 was intended to give labor the limited immunity contended for herein.

Any doubts as to the intent of Section 6 as it passed both Senate and House are disposed of by the history of the Gallinger amendment. On September 1, 1914, the day before the debate on the Culberson amendment, Senator Gallinger brought up the following amendment:

> ". . . nor shall such organizations *when lawfully conducted* or the members thereof be held or construed to be illegal combinations or conspiracies in restraint of trade under the anti-trust laws." (51 Cong. Rec. 14528, 14,530) (italics added)

The Senator explained that the purpose of his amendment was to exempt unions only when they were doing something lawful. It was defeated. (51 Cong. Rec. 14530.)

On the same day, a few minutes later, Senator Gallinger renewed his attempt. He pointed out that the Senate Committee had inserted the word *lawfully* as it now appears in the first clause of the second sentence of Section 6, but had left the second clause, or the Henry amendment, untouched. He again proposed his amendment. The amendment was rejected. Senator Gallinger himself admitted that the defeat of the amendment showed that the insertion of the term "lawfully" does not qualify either the Henry or the Culberson amendment. (51 Cong. Rec. 14544.)

Senator Gallinger tried a third time. On September 2nd, the day the Culberson amendment was adopted, and just prior to the vote on the bill as a whole, he once more protested:

> "In view of the fact that the Senate deliberately refused to agree to the amendment I offered to the bill on yesterday, which amendment proposed to insert the word 'lawful' in Section 7, I find it impos-

sible to support the provision as it now stands. I do not believe that right-thinking laboring men and women want the privilege of doing anything that is unlawful.

"Mr. President, it is contended that 'the people' are demanding this legislation. That term 'the people' is always invoked to bolster up a doubtful cause in this body. For myself I have not heard from 'the people' to any extent in advocacy of this bill . . . Mr. President, what we need in this country today is more business and less laws; more conservatism and less cant; more sanity and less theory; more philosophy and less psychology." (51 Cong. Rec. 14608.)

Whereupon Senator Kern, in answer to the protest of Senator Gallinger, placed in the Record at that point an editorial from the "Outlook" of June 14, 1914. This editorial took the view that the provisions of the Clayton Bill properly exempted labor unions. It stated:

"The whole question whether labor unions should come under the operations of the anti-trust law rests upon the question of whether labor is merchandise or not . . . from the point of view of some economists, labor is regarded as a commodity . . . This is the only ground on which the application of the anti-trust laws to labor unions can be defended."

The bill was then passed. (51 Cong. Rec. 14609.)

IV. THE DECISION OF THE COURT THAT SECTION 6 OF THE CLAYTON ACT DID NOT GIVE LABOR UNIONS A LIMITED IMMUNITY FROM THE ANTITRUST LAWS HAS NO SUPPORT IN THE LEGISLATIVE HISTORY OF THE ACT.

As in the case of the Sherman Act, there is only one decision in which the Supreme Court considered the

effect of Section 6 of the Clayton Act. This is the case of *Duplex Printing Company v. Deering*, 254 U. S. 443.

This was an action for an injunction to restrain a boycott against products of the plaintiff's factory. The plaintiff manufactured printing presses and employed about 200 machinists. Defendants were officers of the local of the Machinists' Union in New York City. The union demanded a union shop, the eight-hour day, and the union scale of wages. When the company refused to agree to these terms, the union placed it upon the unfair list, and the machinists throughout the country adopted a boycott which included (1) warning customers not to purchase Duplex presses and threatening them with strikes if they did so; (2) securing the aid of teamsters who threatened to refuse to handle the company's presses; and (3) generally refusing to work upon the hauling, installing or repairing of the company's machines.

Both the District Court and the Court of Appeals had established that under the law of New York the conduct of the defendants was not illegal. (247 Fed. 192 and 252 Fed. 722.) The Supreme Court therefore placed no reliance upon the common law of restraints of trade. It said:

> "As we shall see, the recognized distinction between a primary and a secondary boycott is material to be considered upon the question of the proper construction of the Clayton Act, but, in determining the right to an injunction under that and the Sherman Act, it is of minor consequence whether either kind of boycott is lawful or unlawful at common law or under the statutes of particular states. Those acts, passed in the exercise of the power of Congress to regulate commerce among the states, are of paramount authority, and their prohi-

bitions must be given full effect irrespective of whether the things prohibited are lawful or unlawful at common law or under local statutes." (254 U. S. 466.)

Nor did the Court rely upon the use of any violent or lawless means by the union. It said:

"It is settled by these decisions (referring to Eastern State Retail Lumber Dealers Association and the Danbury Hatters cases) that such a restraint produced by peaceful persuasion is as much within the prohibition as one accomplished by force or threats of force; and it is not to be justified by the fact that the participants in the combination or conspiracy may have some object beneficial to themselves or their associates which possibly they might have been at liberty to pursue in the absence of the statute." (254 U. S. 467.)

The issue therefore was whether the Sherman Act as amended by Section 6 of the Clayton Act applied to labor unions. On this issue, Mr. Justice Pitney, speaking for the majority, said:

"As to Section 6, it seems to us its principal importance in this discussion is for what it does not authorize, and for the limit it sets to the immunity conferred. The section assumes the normal objects of a labor organization to be legitimate, and declares that nothing in the anti-trust laws shall be construed to forbid the existence and operation of such organizations or to forbid their members from lawfully carrying out their legitimate objects; and that such an organization shall not be held in itself —merely because of its existence and operation— to be an illegal combination or conspiracy in restraint of trade. But there is nothing in the section to exempt such an organization or its members from accountability where it or they depart from its normal and legitimate objects and engage in an

actual combination or conspiracy in restraint of trade. And by no fair or permissible construction can it be taken as authorizing any activity otherwise unlawful, or enabling a normally lawful organization to become a cloak for an illegal combination or conspiracy in restraint of trade as defined by the anti-trust laws." (254 U. S. 469.)

After discussing Section 6 the opinion continues to consider the effect of Section 20 of the Clayton Act. But this has no relation to Section 6. Section 20 in fact represented two previous separate bills which had been passed by the House in 1912 and were added to the Clayton Bill as a matter of parliamentary strategy. See H. R. 22591 and H. R. 23634, House Reports 612 and 613, 62d Cong. 2d Sess.; and Majority and Minority Reports on Clayton Bill, H. Rept. No. 627, 63rd Cong. 2d Sess. In many instances, the jurisdiction of the federal courts to issue injunctions rested upon diversity of citizenship and not upon the anti-trust laws. Cf. Frankfurter & Greene, *op. cit. supra*, p. 11.

We submit that Mr. Justice Pitney's treatment of the legislative intent behind Section 6 of the Clayton Act is a typical example of what Dean Landis has described as the overriding of legislative intent by strong judges.

The fact of the matter is that Mr. Justice Pitney did not consider the full record of the legislative history of Section 6 in its successive changes, the amendments that were proposed and the amendments that were rejected. The briefs of the parties did not contain any such analysis.

On its face, the opinion not only violates the text of the language of Section 6 itself, but its legislative history as well. *First*, in order to support its construction of the law, the Court has stricken out of Section 6, the

Henry amendment. It has done so by carrying over into the Henry amendment the very qualifications of Section 6 as it was originally introduced which it was the purpose of the Henry amendment to avoid. *Second*, the court has put into the law the very terms of the Gallinger proposal that was twice rejected by the Senate. *Third*, the court has completely ignored the effect of the declaration in Section 6 that labor is not a commodity or article of commerce and its significance as disclosed by the Senate debate.

In summary, the court's construction of Section 6 rendered it meaningless, nullified its purpose to effect a change in the Sherman Act as it had been construed before the enactment of Section 6; and left labor in exactly the same position as it was before it secured the pledge of the Democratic Party to which it gave its support in the 1912 elections, before it testified before Senate and House committees, and before it secured the necessary amendments in the course of the passage of the law to make sure of its immunity."

Dean Landis has remarked "The mutilated Clayton Act bears ample testimony to the 'day before yesterday' that judges insist is today." Landis, *op. cit. supra*, 892.

" It is interesting to note that in October, 1914, just after Section 6 had been adopted, Chief Justice Taft, when he was president of the American Bar Association, said:

> "There is language in this section, especially the last clause, which standing alone and without explanation, might seem to show Congressional intention to except such associations and their members altogether from the operation of the anti-trust acts. But such is evidently not the proper construction." (37 Proc. A. B. A. 1914, pp. 373-374.)

But it is to be noted that Mr. Justice Taft's construction depends upon glossing the term "such" in the Henry amendment to refer to "such organizations when lawfully carrying out the legitimate objects thereof." We submit that the term "*such*" refers to the first use of the word "organizations" in Section 6, which defines the subject organizations, and that the Taft construction is inconsistent with the history of the section.

V. THE EFFECT OF THE COURT DECISIONS IS TO CONSTRUE AND HOLD LABOR UNIONS TO BE COMBINATIONS IN RESTRAINT OF TRADE WHENEVER THE ACTIVITIES OF THE UNION ARE CONSIDERED TO BE UNDESIRABLE BY THE COURTS.

We assert that this is the proposition which the cases establish and we submit that on its face it is inconsistent with the history and language of Section 6, which, without qualification, states that labor unions are not to be construed or held to be combinations in restraint of trade under the anti-trust laws.

The doctrine upon which the courts have subjected union activities to the ban of the anti-trust laws is, as Mr. Justice Brandeis has suggested, in essence a variant of the doctrine of malicious combinations, and Brandeis has stated what this means (with Holmes and Clarke, JJ., concurring):

> "The objection to the doctrine of malicious combinations requires some explanation. By virtue of that doctrine damage resulting from conduct such as striking or withholding patronage or persuading others to do either, which without more might be dannum absque injuria because the result of trade competition, became actionable when done for a purpose which a judge considered socially or economically harmful and therefore malicious and unlawful. It was objected that, due largely to environment, the social or economic ideas of judges, which thus became translated into law, were prejudicial to a position of equality between workingman and employer; that due to their dependence upon the individual opinion of judges great confusion existed as to what purposes were lawful and what unlawful; and that in any event,

> Congress, not the judges, was the body which should declare what public policy in regard to the industry struggle demands." (Duplex case, 254 U. S., at pp. 484-485.)

1. The tests used by the courts in applying the anti-trust laws to unions menace the maintenance and extension of union standards.

The result of the application of the anti-trust laws to labor unions is that whenever the action of a labor union interferes with an employer's business in interstate commerce, it can be subjected to a judicial determination as to whether the interference is a restraint of trade under the anti-trust laws.

In order to demonstrate the evil which the Court's application of the anti-trust laws create, let us examine the criteria that have been employed.

Violence or acts criminal or unlawful in themselves have nothing to do with the question. *Duplex v. Deering, supra.* Nor is the mere interruption of the employer's business, which prevents the shipment of his goods into interstate commerce, determinative. *Coronado Cases,* 259 U. S. 344; 268 U. S. 295. The test is rather said to be whether the union intended to cut off the competition of the employer's goods in interstate commerce, and in doing so directly affected a substantial amount of competition. *Second Coronado Case,* 268 U. S. 295, 310.

Thus the Court said in the second Coronado case:

> "We think there was substantial evidence at the second trial in this case tending to show that the purpose of the destruction of the mines was to stop the production of nonunion coal and prevent its shipment to markets of other states than Arkansas, where it would by competition tend to reduce the

price of the commodity and affect injuriously the maintenance of wages for union labor in competing mines."

Of course, the specific action taken by the union must be related to a substantial movement or sale of goods in interstate commerce. *United Leather Workers v. Herkert*, 265 U. S. 457. It is to be noted that the difference between the findings of fact in the first and second Coronado cases is that in the second case there was evidence that the union's organizing drive against the coal company was expressly undertaken to prevent its competition with the unionized coal mines and that the production of the Coronado mines was substantially more than first supposed. *Second Coronado Case*, 268 U. S. 310, 312.

What this means is that if the action taken by the union is part of a plan to organize the unorganized sector of a particular industry in order to protect union standards against the competition of nonunion made goods, then there is an *intent* to restrain trade and the action of the union constitutes an unlawful combination under the anti-trust laws. Under this test it makes no difference whether the union is engaged in a strike or boycott.

The significance of the Supreme Court's decisions is graphically illustrated by two lower court decisions, the *United Mine Workers v. Red Jacket Co.*, 18 F. (2d) 839, and *Alco-Zander v. Amalgamated Clothing Workers*, 35 F. (2d) 203.

The Red Jacket case was an action for injunction brought against the United Mine Workers of America. This was one of 12 suits involving coal operators in the Southern West Virginia base, numbering in all some 316 companies. The facts showed that plaintiffs' mines

operated in "what is probably the most important non-union coal field in the United States." The struggle on the part of the union beginning in July, 1920, to unionize the plants, had brought about a violent conflict, in the course of which the Governor had declared martial law, and Federal troops had been sent in to preserve peace.

Judge Parker relied upon certain facts to show the relation between non-union fields and the rest of the industry which was unionized. Thus, in 1922, the union called a nation-wide strike because of its failure to reach a basic wage agreement in the central competitive field, and the strike was extended to the plaintiffs' mines. Although the strike was settled by the Cleveland wage agreement of August, 1922, it continued as against the non-union operators of West Virginia, except as to those who signed agreements with the union.

Judge Parker in his opinion was careful to point out that the United Mine Workers, no matter how great its control might become over the production of coal, would not become an unlawful organization. He relied upon Section 6 of the Clayton Act as interpreted by the Supreme Court in the *Duplex* case. Moreover, he conceded that a strike was "a lawful instrument in a lawful economic struggle or competition between employer and employees." But he came to the conclusion, "That the defendants have engaged in an actual combination and conspiracy in restraint of trade in a manner quite foreign to the normal and legitimate objects of the union." The Court held in effect that the object of the union was to unionize the West Virginia fields in order to end its competition with the union operators.

Judge Parker said:

"We do not mean, of course, that the union was unlawful of itself, but that defendants as officers of the union had combined and conspired to interfere with the production and shipment of coal by the non-union operators of West Virginia, in order to force the unionization of the West Virginia mines and to make effective the strikes declared pursuant to the policy of the union. The presence of this non-union field in West Virginia has been a hindrance to the union in its very contest with the operators. It has furnished arguments to the operators in wage negotiations and in time of strike has furnished coal which has supplied in part the needs of the country and weakened the effects of the strike. Since 1898 the union officials have recognized the importance of unionizing this field and with the exception of an interim during the World War have been engaged in an almost continuous struggle to force its unionization through interference with the business of the non-union operators. They have called strikes from time to time for this express purpose, and have spent hundreds of thousands of dollars in interfering with their business."

We wish to call the Court's attention to the Amalgamated Clothing Workers' case, since it shows how like a straightjacket the erroneous doctrine forbids unions from stabilizing a chaotic and disturbed industrial situation.

This was an action for an injunction brought by four Pennsylvania corporations against the Amalgamated Clothing Workers. The facts, as recited in the opinion of the Court, showed that at that time Philadelphia was a non-union field, with a production amounting to $80,000,000 a year. On the other hand, the New York garment industry had been unionized. Its production amounted to about $260,000,000 a year.

The existence of a large non-union market so close to the unionized New York market had been for some time a source of anxiety to the Amalgamated and its officers. They believed that because of union wage scales in New York, the New York manufacturers were unable to compete with the Philadelphia market, and that as a result, New York would either lose employment or be compelled to go back to a non-union basis. In fact, New York production had decreased while Philadelphia production had increased.

The plaintiffs quoted statements made in the organs of the Amalgamated and by its officials re-stating the foregoing facts. Thus: "The open shop in Philadelphia must cease, for the Amalgamated is not safe industrially as long as the open shop continues."

The Court said:

> "They leave no doubt whatever that the primary purpose of the campaign for the unionization of the Philadelphia market was the protection of the unionized markets in other States, particularly New York, and that, while the improvement of the condition of the workers in Philadelphia may have been present as a motive, it was at best a secondary and remote one." (35 F. (2d) at p. 205.)

While the Court admitted that the union ultimately intended to bring up the Philadelphia conditions to the union scale, it nevertheless issued an injunction because it said:

> "It is beyond all question that the purpose of the Amalgamated in this case is to stop the production of non-union clothing in Philadelphia. Unless and until the manufacturers there were willing to produce upon a union basis, under a union wage scale and upon union terms the Amal-

gamated did not intend to permit them to produce at all." (p. 208.)

We submit that the facts in the case at bar do not show a violation of the anti-trust law as it has been construed to apply to unions. But the prosecution of this case, the history of the law and its judicial construction, demonstrate the evil of denying labor the limited immunity which Congress intended to confer upon it.

2. The limits of the immunity granted by Section 6 of the Clayton Act have been indicated in certain decisions of this Court.

We have emphasized throughout this brief that the immunity which we contend Section 6 conferred upon labor unions is a limited one. Certain decisions of this Court applying the anti-trust laws to labor unions indicate these very limits.

United States v. Brims, 272 U. S. 549.
Local 167 v. United States, 291 U. S. 293.

And in the recent case of *United States v. Borden*, 60 Sup. Ct. 182, this Court refused to grant an immunity to agricultural organizations which had joined with processors and distributors to fix prices and exclude competitors.[11] It said:

"The right of these agricultural producers thus to unite in preparing for market and in marketing their products, and to make the contracts which are necessary for that collaboration, cannot be deemed to authorize any combination or conspiracy with other persons in restraint of trade that these producers may see fit to devise. In this in-

[11] Several of the recent indictments brought by the Department of Justice deal with situations of this kind.

stance, the conspiracy charged is not that of merely forming a collective association of producers to market their products but a conspiracy or conspiracies, with major distributors and their allied groups, with labor officials, municipal officials, and others, in order to maintain artificial and noncompetitive prices to be paid to all producers for all fluid milk produced in Illinois and neighboring States and marketed in the Chicago area, and thus in effect, as the indictment is construed by the Court below, 'to compel independent distributors to exact a like price from their customers' and also to control 'the supply of fluid milk permitted to be brought to Chicago.'" (pp. 190-191.)

VI. THE LABOR POLICY OF THE FEDERAL GOVERNMENT AS SET FORTH IN SUBSEQUENT LEGISLATION IS INCONSISTENT WITH THE DECISIONS OF THIS COURT DENYING LABOR A LIMITED IMMUNITY UNDER THE ANTI-TRUST LAWS.

We wish to argue under this point that the effect of the Supreme Court decisions which menace any attempt on the part of organized labor to organize unorganized sectors of a particular industry is directly in conflict with the labor policy of the Federal Government which encourages and promotes the full establishment of collective bargaining. We are not claiming that this subsequent legislation in any way repealed or amended Section 6 of the Clayton Act, but we do say that it indicates that Congress believes that labor does have a limited immunity under the anti-trust laws which permits it to take full action against unorganized parts of the industry without running afoul of the anti-trust laws. It is an old canon of construction that subsequent legislation dealing with the same

subject is relevant evidence upon the intent of Congress.

Thus in the recent case of *United States v. Lowden*, 60 Sup. Ct. 248, the question was whether under Section 5 (4) (b) of the Interstate Commerce Act the Interstate Commerce Commission was authorized by Congress to impose terms protecting the employees as a condition to its approval of mergers, leases and consolidations. The statute authorized the Commission "to promote the public interest."

In ascertaining the meaning to be attached to this general phrase, the Court looked to the whole body of legislation in which Congress had dealt with railroad employees, and it said:

> "The now extensive history of legislation regulating the relations of railroad employees and employers plainly evidences the awareness of Congress that just and reasonable treatment of railroad employees is not only an essential aid to the maintenance of a service uninterrupted by labor disputes, but that it promotes efficiency, which suffers through loss of employee morale when the demands of justice are ignored."

The same evidence is present in the case at bar.

In the preface to Berman's study of the Sherman Act, John R. Commons remarks:

> "It is evident from the recent rejection, by the Senate of the United States, of the President's nomination to the Supreme Court of Justice Parker, mainly on account of his opinion in the Red Jacket case, that public opinion, or at least, political opinion, is attacking the Supreme Court on account of its interpretation of the Sherman and Clayton Act." (p. xi.)

Within the last decade, the Federal Congress has enacted a series of measures, each of which protects and favors the growth of strong national labor unions, the establishment of industry wide standards through collective bargaining and the elimination of non-union conditions of economic exploitation and inequality.

1. Norris-LaGuardia Anti-Injunction Act.

In 1932 there was enacted the Norris-LaGuardia Act which placed very severe limitations upon the authority of the Federal judiciary to issue injunctions in cases involving or growing out of labor disputes. The public policy of this legislation is set forth therein in the following words:

> "Whereas, under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership associations, the individual unorganized worker is commonly helpless to exercise actual liberty of Congress and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, whereas although he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ." (Act of Mar. 23, 1932, c. 90, Sec. 2; 47 Stat. 70, 29 U. S. C. Sec. 102.)

The Norris-LaGuardia Anti-Injunction Act was aimed at the same abuse which Congress intended to

eliminate through the Clayton Act, but had been thwarted by judicial misinterpretation. The anti-trust act had been used by corporations in their attempt to smash labor unions through the use of Federal injunctions. Section 20 of the Clayton Act had been completely ignored by the Courts in direct violation of Congressional intent as we have heretofore demonstrated. The Norris-LaGuardia Anti-Injunction Act was enacted in order that once and for all this judicial interference with the development and functioning of labor unions should be eliminated.

2. Railway Labor Act.

In 1934, Congress amended the Railway Labor Act to provide for the complete independence of employees on the railroads in the matter of self-organization. This Act expressly provides that:

> "Employees shall have the right to organize and bargain collectively through representatives of their own choosing . . . No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees." Act of June 21, 1934, c. 691, Sec. 2; 48 Stat. 1186; 45 U. S. C. Sec. 152.)

3. National Labor Relations Act.

In 1935 Congress enacted the National Labor Relations Act which has for a declaration of findings and policy the following:

> "It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial objections to the free flow of com-

merce and to mitigate and eliminate these objections when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." (Act of July 5, 1935, c. 372, Sec. 1; 49 Stat. 449; 29 U. S. C. Sec. 151.)

In addition, the National Labor Relations Act expressly protects the rights of employees to self-organization by providing in Section 7 thereof that:

"Employees shall have the right to self-organization, to form, join or assist labor organizations to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection."

The Act further provides in Section 13 that:

"Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike."

4. Public Contracts Act.

In 1935 Congress enacted the Public Contracts Act which specifically authorizes the Secretary of Labor to fix minimum wage standards for industries, which standards must be complied with before private concerns can bid for Government contracts. (Act of June 30, 1936, c. 1, Sec. 1; 49 Stat. 2036; 41 U. S. C. Sec. 35.) This measure was adopted because a few corporations in each industry were breaking down wage and other standards of an entire industry through their ability to cut wages and thereby underbid their com-

petitors for Government contracts. In establishing a fair minimum standard for all concerns desiring to bid for Government contracts, Congress sought to protect the wage standards achieved by unions through collective bargaining agreements.

5. Fair Labor Standards Act of 1938.

In 1938, Congress enacted the Fair Labor Standards Act of 1938 which fixed minimum wages and maximum hours for all industry either engaged in or which affected interstate commerce. (Act of June 25, 1938, c. 676; 52 Stat. 1060; 29 U. S. C. Sec. 202.) This legislation was based upon a similar need to eliminate destructive competition which thrived upon low wages and sub-standard working conditions in order to protect the wage standards of union-organized portions of the industry.

6. Summary of Recent Federal Labor Legislation.

The Congressional Acts cited above are not isolated enactments. Each constitutes a thread in a definite pattern of social policy. Congress has determined, as demonstrated in this legislation, that the welfare of the people and the preservation of our basic institutions demand that the workers be free of judicial and employers' restraints in the exercise of their right to organize into unions of their own choosing for the purposes of collective bargaining and other concerted activities for mutual aid or protection.

Under this legislative program, labor has been assured of its right to live and grow. Congress in effect has determined that, in balancing the economic interests involved, the welfare of the people demands that labor be permitted to develop strong unions that will

provide a more equitable distribution of the national income, even though this may bring, at times, inconveniences to the public or injuries to specific employers. It is anticipated and intended that under this national policy:

(a) Labor, free to organize, will develop national unions able to cope with modern aggregates of capital to obtain for the workers and their families their fair share of the bounties of the country; and

(b) Unions will be free to exercise their economic power against the employers who are determined to break down and destroy the unions and the standards which they seek to establish, thereby assuring a competitive protection to the employers who desire to cooperate through collective bargaining and comply with the national policy of the country.

It is significant that this policy, in its basic outlines, was advanced and defended by the statesmen who framed and passed the Sherman Act.

CONCLUSION

We have submitted the legislative history of the Sherman and Clayton Acts and an analysis of the major decisions of this Court which have defined the extent to which labor unions are to be held within the prohibitions of such Acts, notwithstanding the clear intent of Congress to the contrary.

We have pointed out that in effect these decisions have held that labor unions may not undertake to enforce economic pressures against a non-union employer for the purpose of making such employer meet the prevailing industrial standards in the industry which the

union has established through collective bargaining. The judicial doctrine, founded upon error, has permitted the Courts to proscribe, within their untrammeled discretion, the specific activities of labor unions that they considered undesirable.

The application of this doctrine under our present economic conditions would revive the anti-trust laws as the most serious threat to the development and functioning of labor organizations. For this reason we respectfully urge this Honorable Court to re-examine these judicial decisions in order that the original intent of Congress to grant labor unions a limited immunity from the anti-trust laws may be effectuated.

Respectfully submitted,

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